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Supreme Court, U.S.

FILED

DEC 23 1971

APPENDIX

E. ROBERT SEAYER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-308

UNITED STATES OF AMERICA, *Petitioner*

v.

**MARIAN A. BYRUM, *Executrix Under the Last
Will and Testament of Milliken C. Byrum,
Deceased***

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT**

**PETITION FOR A WRIT OF CERTIORARI
FILED AUGUST 30, 1971
CERTIORARI GRANTED NOVEMBER 9, 1971**

In the Supreme Court of the United States

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MARIAN A. BYBUM, *Executrix Under the Last
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CIVIL DOCKET

UNITED STATES DISTRICT COURT

Jury demand date: February 7, 1968.

Title of Case

**MARIAN A. BYRUM, EXECUTRIX UNDER THE
LAST WILL AND TESTAMENT OF
MILLIKEN C. BYRUM,
DECEASED.**

vs.

THE UNITED STATES

DOCKET ENTRIES

Date	Proceedings
2- 7-68	Complaint, filed.
2- 7-68	Summons and copy complaint issued to the United States Marshal.
2-27-68	Summons returned executed, filed. Fee \$3.00.
4- 8-68	Answer filed.
7-16-68	Pltf's Motion for Summary Judgment—Memo filed.
8- 9-68	Entry—USA is granted leave to file its memo. contra to motion for summary judgment on or about Sept. 14, 1968, filed.
9-13-68	Defdt's Motion for Summary Judgment filed.
10- 2-68	Defdt's Memo in Support filed.
10-21-68	Pltf's Reply Memo filed.
4-16-70	Opinion and Order—Pltf's Motion for Summary Judgment GRANTED; Defdt's Motion for Summary Judgment DENIED; Defdt is ORDERED to refund \$13,202.45 with interest filed.
6-10-70	Notice of Appeal filed.
6-10-70	Record transferred to US Court of Appeals at Cincinnati, Ohio.

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
For The Sixth Circuit

Case No. 20,526

Date

1970

Filings—Proceedings

- Jun. 11 *Certified record* (1 vol. pleadings), filed; and cause docketed
- Jun. 15 Appearance of counsel for Appellant
- Jun. 16 Appearance of counsel for Appellant
- Jun. 17 Appearance of counsel for Appellee
- Jun. 22 Appearance of counsel for Appellant
- Jun. 22 Statement of Appellant as to the issue to be presented on appeal and designation of record for the appendix
- July 13 Motion: Appendix and Brief for Appellant to 8/21/70 (Granted)
- Aug. 14 Motion: Appellant's brief to 9/8/70 (Granted)
- Aug. 18 Ten copies of Appendix
- Sept. 4 Twenty-five copies of Brief for Appellant
- Sept. 4 Proof of service of brief for Appellant
- Oct. 5 Twenty-five copies of Brief for Appellee
- Oct. 5 Proof of service of brief for Appellee
- Dec. 18 Caused argued and submitted (Before: Phillips, Brooks and O'Sullivan, JJ.)
- Dec. 22 Three copies of Opinion of the Tax Court in *Harry H. Beckwith v Commissioner* from counsel for Appellee (Distributed to the Court).

1971

- Apr. 8 Judgment of the District Court affirmed
- Apr. 8 Opinion by Brooks, J. (Phillips, J., dissenting)
- Apr. 30 Mandate issued (No costs taxed)
- Opinion with mandate
- July 20 Copy of order by the Supreme Court of the United States dated 6/28/71 extending the time for filing petition for writ of certiorari to and including 9/4/71
- Sept. 3 Notice of filing petition for certiorari 8/30/71 (SC No. 71-308)
- Nov. 15 Certified copy of order of the Supreme Court granting certiorari

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

Civil No. 68-42

Marian A. Byrum, Executrix under the Last Will and
Testament of Milliken C. Byrum, Deceased,
Plaintiff,

vs.

The United States,
Defendant.

COMPLAINT

1. Plaintiff is Executrix under the Last Will and Testament of Milliken C. Byrum, Deceased, late of the County of Franklin, State of Ohio, having been duly appointed as such by the Probate Court of the County of Franklin, State of Ohio, on the 2nd day of October, 1964, and duly qualified as such Executrix and has ever since acted and is now acting thereas, and resides in Orient, Franklin County, Ohio and is a citizen of the United States and jurisdiction is conferred upon this Court by Title 28 U.S.C.A., Section 1346(a).

2. This action arises under Section 2036 of the Internal Revenue Code of 1954 and plaintiff has a just claim against defendant for the sum of \$13,202.45, together with interest as provided by law.

3. That on the 29th day of October, 1965, plaintiff filed the Estate Tax return for the estate of the above named decedent in accordance with the provisions of law for the execution and filing thereof, with the District Director of Internal Revenue, Cincinnati, Ohio and at such time and

COMPLAINT

place paid to said Director the sum of \$9,938.16, the amount shown by said return to be due and payable.

4. That said return was duly audited and on the 21st day of June, 1967, the District Director of Internal Revenue mailed to plaintiff a notice of additional Federal tax due of \$13,202.45, which sum plaintiff paid to the District Director of Internal Revenue at Cincinnati, Ohio, on the 28th day of June, 1967. A copy of said notice of additional Federal tax due is annexed hereto and marked Exhibit A.

5. That thereafter and on the 1st day of August, 1967, plaintiff filed with the District Director of Internal Revenue aforesaid in accordance with the statute, a claim for the refund of the said sum of \$13,202.45 and interest and duly demanded the refund and payment of said amount, together with interest as provided by law. A copy of said claim for refund is annexed hereto and marked Exhibit B.

6. That on the 2nd day of November, 1967, plaintiff filed a Waiver of Statutory Notification Of Claim Disallowance with the District Director of Internal Revenue aforesaid; that in addition more than six months have expired since the filing of said claim for refund and the commencement of this suit. A copy of said Waiver Of Statutory Notification Of Claim Disallowance is annexed hereto and marked Exhibit C.

7. That said deficiency or additional Federal tax due was based upon the determination by the District Director of Internal Revenue that the taxable estate of decedent for the purposes of the Internal Revenue Code of 1954 was \$106,669.30.

8. That in determining the taxable estate, the District Director of Internal Revenue erroneously and illegally included in the gross estate of the decedent corporate stock of the total value of \$89,300.00 transferred irrevocably by decedent during his lifetime to a trust, on the basis that the transfer of said corporate stock were transfers under which decedent retained for his life an interest in the transferred property within the meaning of Section 2036 of the Internal Revenue Code of 1954.

9. That no part of the said sum of \$13,202.45, the amount of the tax erroneously and illegally collected from plaintiff has been refunded to plaintiff.

WHEREFORE, plaintiff demands judgment against de-

COMPLAINT—EXHIBIT A

endant for the sum of \$13,202.45, together with interest as provided by law.

/s/ LARRY H. SNYDER
CHAMBLIN, SNYDER & HENRY
Attorneys for Plaintiff
209 South High Street
Columbus, Ohio 43215

The Plaintiff hereby demands a trial by jury of the issues in the within action.

(CAPTION OMITTED)

ANSWER

The defendant, the United States of America, by its attorney, Robert M. Draper, Esquire, United State Attorney for the Southern District of Ohio, answers the complaint as follows:

1. Admits the allegations contained in paragraph 1 of the complaint.
2. Denies the allegations contained in paragraph 2 of the complaint.
3. Admits the allegations contained in paragraph 3 of the complaint.
4. Admits the allegations contained in paragraph 4 of the complaint.
5. Admits the allegations contained in paragraph 5 of the complaint, except denies every material allegation contained in said claim for refund unless otherwise specifically admitted.
6. Admits the allegations contained in paragraph 6 of the complaint.
7. Denies present information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph 7 of the complaint.
8. Denies the allegations contained in paragraph 8 of the complaint.
9. Denies that any tax was illegally or erroneously assessed or collected from the plaintiff, but admits that no refund has been made of taxes paid by plaintiff.

WHEREFORE, defendant prays for judgment in its favor, dismissing plaintiff's complaint with prejudice and awarding defendant its costs and such other and further relief as to the Court seems proper.

.....
United States Attorney

(CAPTION OMITTED)

MOTION FOR SUMMARY JUDGMENT

Complainant, Marian A. Byrum, Executrix of the estate of Milliken C. Byrum, deceased, moves the Court for a summary judgment in her favor upon the complaint and answer herein, for the reason that there is no genuine issue as to any material fact and she is entitled to a judgment as a matter of law.

.....
CHAMBLIN, SNYDER & HENRY
209 South High Street
Columbus, Ohio 43215
Attorneys for Complainant

(CAPTION OMITTED)

MOTION FOR SUMMARY JUDGMENT

(Filed October 8, 1968.)

The defendant, the United States of America, by its attorney, Robert M. Draper, the United States Attorney for the Southern District of Ohio, moves this Court to enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, as amended, a summary judgment in the defendant's favor dismissing plaintiff's complaint on the ground that there is no genuine issue as to any material fact and that the defendant is entitled to a judgment as a matter of law. This motion is based upon the consideration and authorities set forth in the memorandum in support of the defendant which will be submitted to the Court on or before October 1, 1968.

.....
ROBERT M. DRAPER
United States Attorney

(CERTIFICATE OMITTED)

TRUST AGREEMENT

THIS AGREEMENT made at Columbus, Ohio, this 9th day of December 1958 between Milliken C. Byrum of Franklin County, Ohio (hereinafter called the "Grantor") and The Huntington National Bank of Columbus, Columbus, Ohio (hereinafter called the "Trustee") WITNESSETH:

Article I. The Trust Estate. Byrum Trust No. 2.

Grantor, being desirous of immediately creating a trust and trust estate to be known as Byrum Trust No. 2, comprised of 165 shares of the Class A Common Stock of Byrum Lithographing Co., Inc. in consideration of the agreement of Trustee to accept the duties and responsibilities imposed upon it as such Trustee by the terms and provisions of this Trust Agreement, and other valuable consideration the receipt of which is hereby acknowledged, said Grantor hereby delivers to Trustee said property above described.

Article II. Additions To The Trust Estate.

Grantor, and any other person, by inter vivos gifts, or by Last Will and Testament may, transfer, assign, set over and deliver to Trustee, additional property, real or personal, or both, to become a part of the Trust Estate herein created and may make Trustee the beneficiary under life insurance policies covering the life of Grantor or any other person and any and all such additions to the Trust Estate shall be received, dealt with and administered by the Trustee in all respects as if the same had been transferred to the Trustee, concurrently herewith. Any instrument of assignment, transfer or conveyance which refers to this Trust Agreement and describes or identifies the property, rights or interest to be conveyed to the Trustee, which is duly signed by Grantor or by any other person making such gift or bequest, shall be sufficient to make the same a part of this Trust Estate and subject to all of the covenants, terms, provisions and conditions of this Trust.

Article III. Habendum.

To have and to hold such shares and all other property

TRUST AGREEMENT

now or hereafter conveyed to Trustee or added to this Trust, together with all of the dividends and proceeds from all stocks and other securities and all of the rents, income, issues, gains and profits arising from all of said property, real and personal, to the Trustee, or its successors in the Trust hereby created, but in the Trust nevertheless for the uses and Trusts and subject to the provisions herein set forth.

Article IV. Irrevocable Trust.

This Trust shall be irrevocable and Grantor reserves no rights, powers, privileges or benefits either as to the Trust estate or the control or management of the trust property, except as set forth herein.

Article V. Powers Of The Trustee.

The Trustee shall have and possess and may exercise at all times not only the rights, powers and authorities incident to the office or required in the discharge of this trust, or impliedly conferred upon or vested in it, but there is hereby expressly conferred upon and vested in the Trustee all the rights, powers and authorities embodied in the following paragraphs in this Article, which are shown by way of illustration but not by way of limitation:

Retain Assets.

5.01 To retain and continue to hold, in the Trustee's discretion, as a part of the Trust Estate any investment or property; to buy any assets desired from the estate of the Grantor.

Sell.

5.02 To sell at public or private sale, to grant options to sell, to exchange, re-exchange or otherwise dispose of all or part of the property, real or personal, at any time belonging to the Trust Estate, upon such terms and conditions and for such consideration as said Trustee shall determine, and to execute and deliver all instruments of sale or conveyance necessary or desirable therefor.

Claims.

5.03 To enforce, abandon, defend

TRUST AGREEMENT

against, or have adjudicated by legal proceedings, arbitration or by compromise, any claim or demand whatsoever arising out of or which may exist against the Trust Estate.

Nominee.

5.04 To cause any property comprising a part of the Trust Estate to be issued, held or registered in the Trustee's own name without disclosing the fiduciary relationship, in Trustee's name as Trustee, in the name of Trustee's nominee or in such other form that title will pass by delivery.

Investments.

5.05 To invest any money in the Trust Estate in stocks, bonds, investment trusts, common trust funds and any other securities or property, real or personal, secured or unsecured, whether the obligations of individuals, corporations, trusts, associations, governments, expressly including shares and/or obligations of its own corporation, or otherwise, either within or outside of the State of Ohio, as the Trustee shall deem advisable, without any limitation whatsoever as to the character of investment under any statute or rule of law now or hereafter enacted or existing regarding trust funds or investments by fiduciaries or otherwise.

Voting.

5.06 To vote by proxy or in person any stock or security comprising a part of the trust estate, at any meeting, except that, during Grantor's lifetime, all voting rights of any stocks which are not listed on a stock exchange, shall be exercised by Grantor, and after Grantor's death, the voting rights of such stocks shall be exercised by Grantor's wife during her lifetime.

Counsel.

5.07 To employ and follow the advice

TRUST AGREEMENT

of counsel and agents and to determine and pay to them reasonable compensation, whether from principal or income, as the Trustee shall decide.

Taxes.

5.08 The Trustee is given broad, discretionary powers to use the proceeds of insurance or other funds held by it; to pay any part or all of the Federal estate and State inheritance taxes levied upon Grantor's estate and that of his said wife; to advance funds to the executor or administrator of the respective estates, with or without security, and to purchase assets, real or personal, from each estate; to pay all taxes, assessments, costs, insurance charges and other expenses arising in connection with the administration of the Trust Estate, including taxes under the estate of the Grantor and reasonable compensation to the Trustee, its agents and attorneys, and to determine whether and to what extent such taxes, assessments, costs, charges and expenses shall be deducted from and charged against income or principal.

Leases.

5.09 To make leases for any length of time, whether longer or shorter than the duration of this Trust, to commence at the present time or in the future; to extend any lease; to grant options to lease or to renew any lease; it being expressly understood that the Trustee may grant or enter into ninety-nine year leases, renewable forever.

Corporate Reorganization.

5.10 To consent to the reorganization, consolidation, readjustment of the financial structure, or sale of the assets, of any corporation or other organization, the stocks or securities of which are owned by the Trustee, and to take any

TRUST AGREEMENT

action with reference to such stocks or securities, which, in the opinion of the Trustee, is necessary to obtain the benefit of any such reorganization, consolidation, readjustment or sale; to exercise any conversion privilege or subscription right given to it as the owner of any property constituting a portion of the Trust Estate; to accept and hold as a part of the Trust the securities or stocks resulting from any such reorganization, consolidation, readjustment, sale, conversion or subscription.

Real Estate.

5.11 To manage, improve, protect, exchange, partition, contract to sell and sell on any reasonable terms, convey with or without covenants of warranty, dedicate for public purposes, subdivide, or vacate for subdivision, make party wall contracts and agreements, grant easements or changes of any kind, construct, remodel, alter, repair and maintain buildings, upon any real estate which may at any time be a part of the Trust Estate.

Borrow.

5.12 To borrow money from time to time, without personal liability, for any purpose in the administration of this Trust and for the purpose of making advancements or loans to the executor or administrator of Grantor's estate, or to continue or renew any loans made to the Trustee as in said Trustee's judgment shall deem wise and expedient and for the purposes herein set forth.

Income Allocation.

5.13 To determine in its discretion how all receipts and disbursements, capital gains and losses, shall be charged, credited or apportioned between income and principal.

TRUST AGREEMENT

Court Approval.

5.14 The Trustee shall not be required to obtain the authority or approval of any court for any act which it may desire to do in the administration or management of the Trust Estate, or in the disbursement, investment or reinvestment, or management of the trust funds.

Limitation.

5.15 Notwithstanding the powers of the Trustee granted in paragraphs 5.02, 5.05, 5.09 and 5.11 above, the Trustee shall not exercise any of the powers granted in said paragraphs unless (a) during Grantor's lifetime said Grantor shall approve of the action taken by the Trustee pursuant to said powers, (b) after the death of the Grantor and as long as his wife, Marian A. Byrum, shall live, said wife shall approve of the action taken by the Trustee pursuant to said powers.

Article VI. Distribution Prior To Age 21.

Until my youngest living child reaches the age of twenty-one (21) years, the Trustee shall exercise absolute and sole discretion in paying or applying income and/or principal of the Trust to or for the benefit of Grantors child or children and their issue, with due regard to their individual needs for education, care, maintenance and support and not necessarily in equal shares, per stirpes. The decision of the Trustee in the dispensing of Trust funds for such purposes shall be final and binding on all interested persons.

Article VI. Division At Age 21.

When my youngest child reaches the age of twenty-one (21) years, the corpus of the Trust Estate shall be divided into as many equal Trust funds as there are then living and/or deceased children of the Grantor. The division of the fund into separate trusts shall be based upon the assets in the fund at the time of such division without regard for any disparity of payments or application of income and/or principal of the fund among the beneficiaries during the preceding period. If, at the time of such division, any child

TRUST AGREEMENT

of Grantor shall be deceased with issue surviving or then conceived and without having validly exercised the Power of Appointment hereinafter granted, the Trust for such deceased child shall be established for his or her issue. If, however, at the time of such division, any child of the Grantor shall be deceased without issue surviving and without having validly exercised the power of appointment hereinafter granted, then the Trust for such deceased child shall not be established and the property which would have otherwise been distributed to such Trust shall be divided equally between the Trusts for the other children of Grantor or their issue or their appointees, as the case may be. The term "children" as used herein shall be deemed to mean Allen L. Byrum, Janet A. Byrum, James R. Byrum, children of the Grantor now living, and any children hereafter born.

Expenses.

6.01 The Trustee shall pay from the income received by it from each Trust Fund, the costs, charges and expenses of administering that particular Trust Fund, including the compensation of the Trustee, and all taxes levied against the particular Trust Fund or against the Trustee on account of said Trust Fund, or any part thereof, and after the payment thereof, the remaining income shall be credited to said Trust Fund.

Principal Disbursements.

6.02 If prior to attaining the age of thirty-five (35), any one of the children of Grantor shall have an emergency such as an extended illness requiring unusual medical or hospital expenses, or any other worthy need including education of such child, the Trustee is hereby authorized and empowered to pay such child or use for his or her benefit such amounts of income and principal of the Trust as the Trustee in its sole judgment and discretion shall determine.

Article VII. Termination.

Upon the death of a son or daughter who is the bene-

TRUST AGREEMENT

ficiary of a fund, or if a son or daughter shall be deceased at the time the fund for his or her issue or appointee is established, the net income of his or her fund shall be divided by the Trustee among the issue of the deceased son or daughter, per stirpes, unless he or she shall designate in his or her Last Will and Testament that his or her spouse and/or issue shall receive and enjoy all or any portion of the net income and/or corpus, in which event the net income and/or corpus shall be paid by the Trustee to those designated in such manner and amounts as provided in said Last Will and Testament. If said son or daughter dies without validly exercising the power of appointment herein granted and without issue, then said corpus shall be retained by the Trustee for the Trust or Trusts established for the benefit of any other surviving children of the Grantor or their issue as herein provided; and if none, then the corpus be distributed to the other children or issue of the Grantor, per stirpes.

Each Trust created herein shall terminate when the son or daughter of Grantor, who is the beneficiary of said Trust, has attained the age of thirty-five (35) years and the property then comprising it shall be distributed to said beneficiary. If said beneficiary dies before attaining the age of thirty-five (35) years, said Trust shall terminate when said deceased son or daughter would have attained the age of thirty-five (35) years had he or she lived. If at the time said Trust is terminated, there shall be no issue then living of said beneficiary, the property comprising the said Trust Fund shall be paid and distributed to the issue of the Grantor, per stirpes; provided, however, that in the event any portion of said fund is distributable to Grantor's issue for whom Trust Funds are then in existence under this Agreement, such distribution shall be added to such Trust Funds.

Article VIII. Removal Of Trustee.

If the Trustee, The Huntington National Bank of Columbus, Columbus, Ohio, shall at any time change its name or combine with one or more corporations under one or more different names, or if its assets and business at any time shall be purchased and absorbed by another trust company or corporation authorized by law to accept these

TRUST AGREEMENT

trusts, the new or successor corporation shall be considered as the said The Huntington National Bank of Columbus, Ohio, and shall continue said Trusts and succeed to all the rights, privileges, duties and obligations herein conferred upon said The Huntington National Bank of Columbus, Columbus, Ohio, Trustee.

Grantor, prior to his death, and after the death of the Grantor, the Grantor's wife, Marian A. Byrum, during her lifetime, may remove or cause the removal of The Huntington National Bank of Columbus, Ohio, or any successor Trustee, as Trustee under the Trusts and may thereupon designate another corporate Trustee to serve as successor Trustee hereunder.

Article IX. Miscellaneous Provisions.

Minor.

9.01 If any beneficiary shall be a minor at the time he or she is entitled to receive payments of income under the terms of this Trust, the Trustee is fully authorized and empowered to pay such income to him or her or for his or her benefit without the necessity for the appointment of a legal guardian.

Discretion.

9.02 If in the opinion of the Trustee it shall appear that the total income of any beneficiary of any Trust fund created hereunder is insufficient for his or her proper or suitable support, care and comfort, and education and that of said beneficiary's children, the Trustee is authorized to pay to or for such beneficiary or child such additional amounts from the principal of the Trust Estate as it shall deem advisable in order to provide suitably and properly for the support, care, comfort, and education of said beneficiary and of said beneficiary's children, and the action of the Trustee in making such payments shall be binding on all persons.

Spendthrift.

9.03 If, because of any alienation or attempted alienation by the beneficiary

TRUST AGREEMENT

of any interest or right to receive payments under any Trust hereby created, or if, from any cause whatsoever, such payments or any part thereof shall, or but for this proviso would, at any time become payable to or pass to or for the benefit of any person other than such beneficiary, then the interest in and the right of such beneficiary to receive such payments shall cease and determine and thereafter said payments, or such part thereof as shall become so forfeited by such beneficiary, shall be applied as determined by the Trustee in its uncontrolled discretion to the use of any other beneficiary or beneficiaries in such manner and portions as such Trustee may deem best; provided, further, that notwithstanding any forfeiture by a beneficiary as aforesaid, said Trustee in its uncontrolled discretion, but without any obligation so to do, may from time to time apply or direct the application of said portion of such payments forfeited as aforesaid, or so much thereof as to it deems best, to the use of the beneficiary so forfeiting the same.

**Issue Under
Age 21.**

9.04 In the event that any issue of the children of the Grantor shall not have attained the age of twenty-one (21) years at the time he shall be entitled to distribution of any part of the corpus, whether by the terms of this Agreement or by virtue of the exercise of the power of appointment hereinbefore granted to the Grantor's children, such distribution shall be postponed and the Trust as herein provided shall continue until such issue shall have attained the age of twenty-one (21) years. Until such issue shall have attained the age of twenty-one (21) years, the Trustee shall pay such

TRUST AGREEMENT

part or amount of income and principal as the Trustee, in its sole judgment and discretion, shall determine and said Trustee shall be fully authorized and empowered to pay such amounts of income or principal to him or her or for his or her benefit without the appointment of a legal guardian.

Ultimate
Termination.

9.05 All Trusts created hereunder shall in no event terminate later than twenty-one (21) years after the death of the last survivor of Grantor, his wife, and the Grantor's issue living at the date of his death.

Contingent
Beneficiary.

9.06 At the time of termination should there be no persons as heretofore provided to receive distribution of the fund or funds established hereunder, then distribution shall be made to Byrum Lithographing Co., Inc., an Ohio corporation or its successor, free of Trust.

IN WITNESS WHEREOF, I, Milliken C. Byrum, have hereunto set my hand and said The Huntington National Bank of Columbus, Columbus, Ohio, to evidence its acceptance of the trusts herein expressed has hereunto set its hand and seal by its duly authorized officer, on the day and year first above written.

SIGNED IN THE PRESENCE OF:

.....
.....
.....
.....

..... GRANTOR
Milliken C. Byrum
THE HUNTINGTON NATIONAL
BANK OF COLUMBUS, TRUSTEE

BY
Trust Officer

(CAPTION OMITTED)

AFFIDAVIT

STATE OF OHIO
COUNTY OF FRANKLIN, SS:

L. E. Green, being first duly sworn, says that he is Assistant Vice-President and Trust Officer of The Huntington National Bank of Columbus, Columbus, Ohio, trustee under the trust created by the Trust Agreement of December 9, 1958, between Milliken C. Byrum and The Huntington National Bank of Columbus and that the attached instruments entitled "Principal Ledger," "Income Cash Ledger" and "List of Assets As Of The End Of The Year," were compiled and prepared under his supervision from the records of The Huntington National Bank of Columbus pertaining to the Milliken C. Byrum Trust, and that these instruments show all of the receipts of, and disbursements from, said trust and the assets comprising the trust corpus for the periods therein referred to.

That during the period from December 9, 1958, to September 5, 1964 there were no distributions to or on behalf of the beneficiaries or any one or more beneficiary from trust income or principal, nor was any request made by any beneficiary for a distribution of income or principal, and that the only payments from trust funds during this period were for the expenses of administering such trust.

/s/ L. E. GREEN

(NOTARIZATION OMITTED)

NAME Byrum, Milliken C

PRINCIPAL LEDGER

DATE	DESCRIPTION	PROFIT OR LOSS	INVESTMENTS RECEIVED CASH DISBURSED	INVESTMENTS DELIVERED CASH RECEIVED	PRINCIPAL BALANCE CR	
					INVESTED DR.	UNINVESTED DR.
DEC 31 '59	BY DEPOSIT-BYRUM LITHOGRAPHING CO INC CLASS A NO PAR COMMON STOCK RECEIVED CTF #A131 FOR 105 SHARES NEG N/O CAREY & CO		155 00		155 00*	00*
JAN 5 '60	PURCHASED 25 MATURITY VALUE U S OF A SAV BONDS SER E DUE 9-1-63 THRU THE HUNTINGTON NATIONAL BANK 25 PAR AT 111.45		18 75		183 75*	18 75*
				2 25	183 75*	16 50*
				16 50	183 75*	00*
DEC 31 '59	DEPOSIT CTF 500 TRANSFERRED FROM INCOME CASH A/C					
DEC 21 '59	BY DEPOSIT - 100 SHARES GRAPHIC REALTY INC CLASS A COMMON CERT #A21 AT 60 SHARES AC2 AT 128 SHRS REG N/O CAREY & CO		103 00		371 75*	00*
JUL 1 '60	BY DEPOSIT - 240 SHARES BYCHROME CO CLASS "A" COMMON CAPITAL CTF #A23 AT 220 SHARES A24 AT 20 SHRS NEG N/O CAREY & CO		240 00		611 75*	00*
JUN 30 '60	BY DEPOSIT 61 SHARES BYCHROME CO CLASS A COMMON CTF #A33 AT 60 SHARES C CTF #A34 AT 1 SHARE REG N/O CAREY & CO (1 SHARES MARIAN A BYRUM) (60 SHARES M C BYRUM)		61 00		672 75*	00*

SHEET NO. 2

NAME

Byrum, Milliken C

THE HUNTINGTON NATIONAL BANK OF COLUMBUS
COLUMBUS, OHIO

TRUST NO. LT-706

PRINCIPAL LEDGER

DATE	DESCRIPTION	PROFIT OR LOSS	INVESTMENTS RECEIVED CASH & SECURED	INVESTMENTS DELIVERED CASH RECEIVED	INVESTED OR UNINVESTED DR.	PRINCIPAL BALANCE CR. UNINVESTED DR.
	FWD					672 75*
11-20-60	BY DEPOSIT 32 SHARES GRAPHIC REALTY INC CLASS A COMMON CTF #A71 AT 30 SHARES C CTF #A72 AT 2 SHARES (2 SHARES MARIAN A BYRUM) 130 SHARES BY DEPOSIT 15 SHS BYRUM JONES INC COM CTF #9 FOR 15 SHS REG N/O CAREY & CO		32 00			704 75*
11-24-60	PUR 42 SHS BYRUM JONES INC COM THRU BYRUM LITHOGRAPHING CO INC 11.25 PER SHR REF FROM INCOME CASH ACCOUNT FOR REINVESTMENT		108 75			873 50*
11-24-60	DEPOSIT FROM M.C. BYRUM		472 50			1346 00*
11-23-60	U S OF A SAV BOND SER E DUE 9-1-68 PROCEEDS FROM THE REDEMPTION OF 125 FROM INCOME CASH ACCOUNT			68 60 384 99		1346 00*
11-23-60	TRANSFERRED FROM INCOME ACCOUNT			18 75 16		1327 25*
11-20-60	PURCHASED 3 SHARES OF BYRUM-JONES INC AT \$35 PER SHARE			105 00		1327 25*
11-20-60	BY DEPOSIT 25 SHARES BYRUM-JONES INC CAPITAL STOCK CTF #18 REG N/O CAREY & CO GIFT FROM MILLIKEN BYRUM		105 00			1432 25*
			875 00			2307 25*

TRUST NO.

LT-706

THE HUNTINGTON NATIONAL BANK OF COLUMBUS
COLUMBUS, OHIO

NAME Byrum, M I Iken C

TRUST No.
LT-706

320 015 00 1

PRINCIPAL LEDGER

DATE	DESCRIPTION	PROFIT OR LOSS	INVESTMENTS RECEIVED CASH DISBURSED	INVESTMENTS DELIVERED CASH RECEIVED	PRINCIPAL BALANCE CR.	
					INVESTED DR.	UNINVESTED DR.
6-20-61	FWD (10-20-61) BY DEPOSIT 55 SHARES GRAPHIC REALITY INC CLASS A COMMON STOCK CTF #A99 AT 44 AT 10 AT 12 SHARES REG N/O CAREY & CO 12 SHARES MAYNARD A BYRUM		2323 44		2307 25*	00*
6-29-61	BY DEPOSIT 7 SHARES CYCLOCOR CO CLASS A NO PAR COMMON STOCK CTF #A39 REG N/O CAREY & COMPANY (ACQ 9-15-61)		390 09		4030 69*	00*
7-18-62	CASH RECEIVED .10 FUNDS TRANSFERRED FROM INCOME CASH ACCOUNT 74.90			75 00	5028 78*	75 00*
7-19-62	PURCHASED 100.00 PAR US OF A SAVINGS BOND SER E DUE 5-1-70 THRU THE HUNTING NATIONAL BANK PF COLS BOND DEPT		75 00		5103 78*	00*
8-23-63	PURCHASED 100.00 MATURITY VALUE US OF A SAVINGS BONDS SERIES E DUE 5-1-71 THRU THE HUNTINGTON NATIONAL BANK AT 75		75 00		5178 78*	75 00*
8-23-63	DEPOSIT FROM M C BYRUM			75 00	5178 78*	00*
8-31-64	FUNDS TRANSFERRED FROM INCOME CASH ACCOUNT FOR INVESTMENT			74 90	5178 78*	74 90*
8-31-64	BY DEPOSIT 75.00 CASH			10	5178 78*	75.00*

FWD

THE HUNTINGTON NATIONAL BANK OF COLUMBUS
COLUMBUS, OHIO

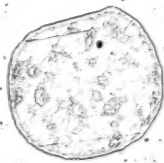
SHEET No. 4

NAME Byrum, William C.

TRUST NO. LT-706
320 015 00 1

PRINCIPAL LEDGER

DATE	DESCRIPTION	PROFIT OR LOSS	INVESTMENTS RECEIVED CASH DISBURSED	INVESTMENTS DELIVERED CASH RECEIVED	PRINCIPAL BALANCE CR.	
					INVESTED DR.	UNINVESTED DR.
4-31-64	PURCHASED \$100.00 PAR VAL. U S OF A SAVINGS BOND SERIES E ISSUED 8-1-64 THRU THE HUNTINGTON NATIONAL BANK OF COLUMBUS BOND DEPARTMENT				5178 78*	75 00*
6-7-64	SOLD 85 SHS BYRUM-JONES INC THRU CHAUBLIN SNYDER AND HENRY AT 2.00	1751 25	75 00	170 00	5253 78*	00*
					5983-79* 3632 53	170 00*



INCOME CASH LEDGER

DATE	DESCRIPTION	DEBIT	RECEIVED CREDIT	CASH BALANCE DEBIT
6-30-59	BYRUM LITHOGRAPHING CO DIV DUE AS OF 6-30-59 105 SHARES AT .10 PER SHARE	16 50	16 50	16 50
	TRANSFER TO PRINCIPAL FOR RE-INVESTMENT			
6-30-60	BY CHROME CO CLAS (A) CASH DIVIDEND AS OF JUNE 30 1960 ON 301 SHARES AT .10 PER SHARE	30 10	30 10	
6-30-60	BYRUM LITHOGRAPHING CO INC CLASS (A) CASH DIVIDEND AS OF JUNE 30 1960 ON 105 SHARES AT 10 PER SHARE	16 50	16 50	
6-30-60	GRAPHIC REALTY INC CLASS (A) CASH DIVIDEND AS OF JUNE 30 1960 ON 276 SHARES AT .10 PER SHARE	22 00	22 00	68 60
	TRANSFER TO PRINCIPAL CASH ACCOUNT FOR REINVESTMENT			
9-1-60	INCREMENT DERIVED FROM THE REDEMPTION OF 25 PAR VALUE U S OF A SAV BONDS SER (E) DUE 9-1-60	16	16	16
	TRANSFER TO PRINCIPAL CASH ACCOUNT			
6-30-61	BY CHROME COMPANY CLASS (A) CASH DIVIDEND AS OF JUNE 30 1961 301 SHARES CLASS (A) AT 10 PER SHARE	30 10		
	BYRUM LITHOGRAPHING COMPANY INC CASH DIVIDEND AS OF JUNE 30 1961 105 CLASS (A) SHS AT 10 PER SHARE	16 50		
	GRAPHIC REALTY INC CASH DIVIDEND AS OF JUNE 30 1961 276 CLASS (A) SHARES AT 10 PER SHARE	22 00	68 60	
6-30-61	BYRUM LITHO INC CASH DIVIDEND AS OF JUNE 30 1961 57 SHARES AT 25 PER SHARE	14 25		
	BY DEPOSIT - VOUCHER FROM M. C. BYRUM	22 15	36 40	
	TRANSFER TO PRINCIPAL ACCOUNT			
6-30-62	BYRUM LITHOGRAPHING CO INC DIVIDEND ON 105 SHARES CLASS A COMMON STOCK AT 10 A SHARE	16 50	105 00	
	GRAPHIC REALTY INC-DIV ON 276 CLASS A COMMON STOCK AT 10 A SHARE	27 60		
	BY CHROME CO-DIVIDEND ON 303 SHARES CLASS A COMMON STOCK AT 10 A SHARE	30 30	74 90	

TRUST NO

LT-706

FWD

SHEET No. 2

NAME BYNUM MILLIKEN C

THE HUNTINGTON NATIONAL BANK OF COLUMBUS
COLUMBUS, OHIO

TRUST No. LT-706

Assets of L. E. Group - Income Cash Ledger

320 015 00 1

INCOME CASH LEDGER

DATE	DESCRIPTION	DISBURSED DEBIT	RECEIVED		CASH BALANCE DEBIT
			CREDIT		
12-31-02	FUNDS TRANSFERRED TO PRINCIPAL CASH ACCOUNT	74 90			74 90* 00
1-31-03	<div> <div> <div>FWD</div> <div>DIVIDENDS FOR FOLLOWING</div> <div>BY CHROME CO CLASS A DIV 308 SHS AT .10</div> <div>BYRUM LITHOGRAPHING CO CLASS A DIV 165 SHS AT .10</div> <div>GRAPHIC REALTY INC. DIV 276 SHS AT .10</div> </div> <div> <div>30.80</div> <div>16.50</div> <div>27.60</div> <div>74.90</div> </div> </div>				
3-31-03	FUNDS TRANSFERRED TO PRINCIPAL CASH ACCOUNT FOR INVESTMENT	74 90	74 90		74 90 00
4-8-03	<div> <div>BYRUM LITHOGRAPHING CO DIV 165 SHS AT 2.00</div> <div>GRAPHIC REALTY INC CLASS A DIV 276 SHS AT 2.00</div> <div>BYCHROME CLASS A DIV 308 SHS AT 2.00</div> </div> <div> <div>330.00</div> <div>552.00</div> <div>616.00</div> </div>		1498 00		1498 00

TRUST No.

LT-706

Affidavit of L. E. Green — List of Assets

**YEARLY LIST OF ASSETS
AS OF THE END OF THE YEAR**

BYRUM, MILLIKEN C.

Trust #320 015 00 1

<u>Year</u>	<u>No. of Shares</u>	<u>Description</u>
1958	165	Byrum Lithographing Co., Inc., Class A Common Stock
1959	165	Byrum Lithographing Co., Inc., Class A Common Stock
	188	Graphic Realty Inc., Class A Common Stock
	\$25 par val	U.S. of A. Savings Bonds Series E due 9-1-68
	240	Bychrome Co., Class A
1960	165	Byrum Lithographing Co., Inc., Class A Common Stock
	220	Graphic Realty Inc., Class A Common Stock
	57	Byrum Jones Inc., Common Stock
	301	Bychrome Co., Class A
1961	165	Byrum Lithographing Co., Inc., Class A Common Stock
	276	Graphic Realty Inc., Class A Common Stock
	85	Byrum Jones Inc., Common Stock
	308	Bychrome Co., Class A
1962	165	Byrum Lithographing Co., Inc., Class A Common Stock
	276	Graphic Realty Inc., Class A Common Stock
	85	Byrum Jones Inc., Common Stock
	308	Bychrome Co., Class A
	\$100 par val	U.S. of A. Savings Bonds Series E due 6-1-70

Affidavit of L. E. Green - List of Assets

<u>Year</u>	<u>No. of Shares</u>	<u>Description</u>
1963	165	Byrum Lithographing Co., Inc., Class A Common Stock
	276	Graphic Realty Inc., Class A Common Stock
	85	Byrum Jones Inc., Common Stock
	\$100 par val	U.S. of A. Savings Bonds Series E due 6-1-70
	\$100 par val	U.S. of A. Savings Bonds Series E due 5-1-71
1964	308	Bychrome Class A
	165	Byrum Lithographing Co., Inc., Class A Common Stock
	276	Graphic Realty Inc., Class A Common Stock
	85	Byrum Jones Inc., Common Stock
	\$100 par val	U.S. of A. Savings Bonds Series E due 6-1-70
1965	\$100 par val	U.S. of A. Savings Bonds Series E due 5-1-71
	\$100 par val	U.S. of A. Savings Bonds Series E due 8-1-64
	308	Bychrome Class A
	165	Byrum Lithographing Co., Inc., Class A Common Stock
	276	Graphic Realty Inc., Class A Common Stock
	\$100 par val	U.S. of A. Savings Bond Series E due 6-1-70
	\$100 par val	U.S. of A. Savings Bond Series E due 5-1-71
	\$100 par val	U.S. of A. Savings Bond Series E due 8-1-64
	308	Bychrome Class A

Affidavit of L. E. Green — List of Assets

<u>Year</u>	<u>No. of Shares</u>	<u>Description</u>
1966	165	Byrum Lithographing Co., Inc., Class A Common Stock
	276	Graphic Realty Inc., Class A Common Stock
	\$100 par val	U.S. of A. Savings Bond Series E due 6-1-70
	\$100 par val	U.S. of A. Savings Bond Series E due 5-1-71
	\$100 par val	U.S. of A. Savings Bond Series E due 8-1-64
	308	Bychrome Class A

(CAPTION OMITTED)

AFFIDAVIT

STATE OF OHIO
COUNTY OF FRANKLIN, SS:

Fritz D. Babbert, being duly sworn, says that he is Vice President and Secretary of Byrum Lithographing Co., Inc., and Graphic Realty, Inc. and is Executive Vice President and Secretary of ByChrome Co., and that the following is a list of the stockholders of said three corporations and the number of shares held by each of such stockholders, on the dates indicated, as shown by the records of said corporations:

BYRUM LITHOGRAPHING CO., INC.

Stockholder	December 9, 1958		September 5, 1964	
	Class A *	Class B *	Class A	Class B
Jack Babbert	14	70	16	80
Albert R. Brose	25	125	33	165
M. C. Byrum	22	935	5	850
Carey & Co.	165	—	165	—
John H. Graessle	8	40	—	—
Milton J. Crites	2	10	4	20
Fritz D. Babbert	4	20	6	30
Eddie H. O'Neill	2	10	2	10
Glenn K. Starkey	6	30	6	30
C. Ray Bradley	2	10	—	—
Ruth A. Schleich	—	—	2	10
Aquilla Flewellen, Jr.	—	—	1	5

* Both classes have voting power of one vote for each share.

Affidavit of Fritz Babbert

BYCHROME CO.

Stockholder	December 9, 1958	September 5, 1964	
	Common	Class A *	Class B *
M. C. Byrum	22	—	287
Marian A. Byrum	2	—	21
Albert R. Brose	3	30	30
Fritz D. Babbert	1	—	—
Jack L. Babbert	3	—	—
Glenn K. Starkey	1	—	—
Carey & Co.	—	308	—
Allen Byrum	—	1	1

* Articles amended 12/14/59 to authorize two classes of common, both voting, each common shareholder receiving 10 shares of Class A and 10 shares of Class B in exchange for one share of common held.

GRAPHIC REALTY INC.

Stockholder	December 9, 1958	September 5, 1964	
	Common	Class A *	Class B *
M. C. Byrum	128	—	202
A. R. Brose	19	9	9
Fritz D. Babbert	6	—	—
Glenn K. Starkey	6	—	—
Milton J. Crites	4	—	—
Jack L. Babbert	10	—	—
John H. Graessle	8	—	—
Eddie H. O'Neill	3	—	—
Forrest Bonner	1	—	—
Henry Barrett	2	—	—
C. Ray Bradley	3	—	—
Marian A. Byrum	60	—	74
Carey & Co.	—	276	—
Allen Byrum	—	2	2

* Articles amended 12/14/59 to authorize a Class A and a Class B common, both voting, one of each class issued in exchange for one share of common.

Affiant says further that at all times during the period from December 9, 1958 to September 5, 1964, there were outstanding minority shareholders in each of said three

Affidavit of Fritz Babbert

corporations, who were unrelated to the decedent Milliken C. Byrum.

Further affiant saith not:

/s/ **FRITZ D. BABBERT**

(NOTARIZATION OMITTED)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action 68-42

MARIAN A. BYRUM, Executrix, etc., PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT

[Filed April 16, 1970]

OPINION AND ORDER

This matter is before the Court on the motions of both the plaintiff and the defendant for summary judgment under the provisions of Rule 56 of the Federal Rules of Civil Procedure.

Rule 56(a) Fed. R. Civ. P. authorizes that "a party seeking to recover upon a claim . . . may . . . move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof." Rule 56(b) Fed. R. Civ. P. makes essentially similar provisions with respect to a defending party. Where the pleadings and affidavits on file show that there is no genuine issue as to any material fact relating to the issues presented by the motion, a summary judgment on the motion, if appropriate, may be rendered forthwith.

On July 16, 1968, the plaintiff, Marian A. Byrum, Executrix of the estate of Milliken C. Byrum, deceased, moved this Court for summary judgment in her favor on the pleadings. A memorandum of law accompanied this motion. Then on September 13, 1968, defendant, United States of America, filed its motion for summary judgment and the memorandum in support thereof was received on October 2, 1968. Finally, on October 21, 1968 the plaintiff filed a reply memorandum.

The facts which have given rise to this lawsuit are undisputed and the vehicle of summary judgment as provided in the federal rules seems a most appropriate method of resolving the issues presented. Under a Trust Agreement

dated December 9, 1958, a certain block of common capital voting stock was transferred by the decedent during his lifetime to the Huntington National Bank as sole trustee. The agreement provided for a discretionary trust for the benefit of the settlor's children with the corpus being administered as a single trust until the youngest child reaches the age of 21 years. Prior to the youngest child reaching the age of 21 years, the distribution of income and principal was in the absolute and sole discretion of the trustee, "with due regard to the individual needs for education, care, maintenance and support" of the children or any child.

The trust, by its terms, was irrevocable with the rights retained by the settlor being the power to vote the unlisted corporate stock in the trust, the power to remove the designated trustee and appoint a successor corporate trustee, and the power to veto the sale or investment of the trust corpus.

The Court is directly concerned with the interpretation to be given to a section of the Internal Revenue Code. Section 2036 of Title 26, United States Code, provides in relevant part:

(a) General rule.—The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in the case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact and before his death—

- (1) the possession or enjoyment of, or the right to the income from, the property, or
- (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

The specific provision of the Trust Agreement which will be the focus of the present judicial inquiry is Section 5.06. It provides:

[The Trustee shall have the power] To vote by proxy or in person any stock or security comprising a part of the trust estate, at any meeting, except that, during

Grantor's lifetime, all voting rights of any stocks which are not listed on a stock exchange, shall be exercised by Grantor, and after Grantor's death, the voting rights of such stocks shall be exercised by Grantor's wife during her lifetime.

The precise legal question presented to the Court for determination is whether Section 2036(a)(1) and/or (2) of the Internal Revenue Code operates to make includable in the gross estate of the decedent the unlisted corporate stock mentioned in Section 5.06 of the Trust Agreement.

The Court is not without legal precedent on this matter although there does not appear to be any prior decisions dealing with these identical set of facts. With respect to Section 2036(a)(1) of the Internal Revenue Code, the includability of the corpus of the trust in the gross estate for estate tax purposes is predicated upon three requirements: (1) there must be an inter vivos transfer by the decedent by trust or otherwise; (2) the decedent must have retained "the possession or enjoyment of or the right to income from the property"; and, (3) such retention of reservation must have been for the decedent's life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death. *Richards v. C.I.R.*, 375 F.2d 997 (10th Cir. 1967) and 26 U.S.C.A. § 2036(a)(1).

There is no dispute in this case with respect to (1) and (3) above, but the applicability of (2), that is, whether the decedent retained "the possession or enjoyment of or the right to income from the property," is a determination that must be made by the Court.

For the purposes of the statute which makes includable in a decedent's gross estate for federal tax purposes the value of all property of which the decedent made a transfer under which he retained for his life the possession or enjoyment thereof, the term enjoyment is not a word of art but is synonymous with substantial present economic benefit. *McNichol's Estate v. C.I.R.*, 265 F.2d 667 (3d Cir. 1959), cert. denied, 361 U.S. 829.

The Government's own regulations seem to follow a similar interpretation of this term:

The "use, possession, right to the income, or other enjoyment of the transferred property" is considered as having been retained by or reserved to the decedent

to the extent that the use, possession, right to the income, or other enjoyment is to be applied toward the discharge of a legal obligation, or otherwise for his *pecuniary benefit*. Reg. § 20.2036-1. [Emphasis added.]

Case law defining the exact scope of the term "substantial present economic benefit" is somewhat sparse, especially with reference to the fact situation that is presented in this case. The case of *Yeazel v. Coyle*, 2 CCH Fed. Estate & Gift Tax Rep. (68-1 U.S. Tax Cas.) ¶ 12,524 (N.D. Ill. Nov. 18, 1968), provides the Court with a relevant discussion of the matter. In *Yeazel*, the testator had transferred to herself as trustee, shares of stock in a corporation in which she was, prior to the transfer, sole shareholder. The trust instrument gave her broad authority to sell and invest the corpus without the limitation of any statute or rule of court concerning investment by trustees and she was empowered "to vote all stock held as part of the trust property." The Government contended that the trust transfer left the decedent with significant powers over this stock, including the ability to control the corporation and thus the distribution of dividends, thereby making the value of the stock includable in the gross estate under Section 2036(a)(1).

It is apparent that the decedent retained no direct pecuniary benefit from the stock she placed in trust. All of the income was to be paid to the named beneficiaries. The corpus of the trust was irrevocably earmarked for the four beneficiaries. . . . It is true that by reason of retaining the voting rights, Mrs. Crowley remained in the position of controlling the dividend policy of the corporation and the distribution of income to the beneficiaries. Although Mrs. Crowley could have prevented the corporation from paying a dividend, that action would not have deprived the beneficiaries of the possession or enjoyment of either the property or income because the retained earnings of the company would increase, thus making the beneficiaries' stock more valuable. . . . Even without the direct payment of dividends, the beneficiaries were in a position to receive the economic benefit of the stock since they could use it as security for a loan which would provide them with cash until the end of the ten year period, at which time they would receive the

stock itself. If the Government's argument were carried to its logical conclusion, the donor of the stock in a closely held corporation would be required to divorce himself of all remaining interest in the corporation in order to make his gift effective for tax purposes. The sweep of Section 2036(a), is not that broad. *Yeazel*, *supra*, at 8684-5.

The Court substantially agrees with the rationale of the *Yeazel* opinion. The Government seeks to distinguish *Yeazel* on the ground that the decedent there was also the trustee, thus her retained power was limited by the fiduciary obligation, enforceable in a court of equity, imposed by her position as trustee. The fact that Byrum in this case was not a trustee, however, indicates to the Court that Byrum was that much further removed from control of the economic benefits of the stock. Further, while it is true that Byrum had the power to remove the trustee and appoint a successor corporate trustee at any time (thus in reality, the Government suggests Byrum had trustee type control over the trust corpus), whatever powers exercised by any successor corporate trustee were subject to scrutiny by a court of equity, thus preventing abuse of the trustee's power in favor of Byrum and thus squaring the *Yeazel* rationale with the facts in the instant case.

Section 2036(a)(2) of the Internal Revenue Code provides that the value of the gross estate of a decedent shall include the value of all property in which the decedent has retained:

the right, either alone or in conjunction with any person, to designate the person who shall possess or enjoy the property or the income therefrom. 26 U.S.C.A. § 2036(a)(2).

The Government contends that the settlor's retention of his right to vote the unlisted stock transferred in trust together with his right to vote the stock he still owns gives him the right to designate the recipient of the income under the Trust Agreement. Reliance is placed by the Government on Revenue Ruling 67-54, 1967-1 Cumulative Bulletin 269. This ruling states:

The value of nonvoting corporate stock transferred in trust is includible in the grantor's gross estate where

the grantor retained for the remainder of his life a controlling interest in the corporate voting stock and where the trustee was restricted in his power to dispose of the nonvoting stock, and the trustee held the nonvoting stock at the grantor's death. Since the grantor retained the power to regulate the income from the transferred property, he retained for his life, or for a period which did not in fact end before his death the right to designate the persons who shall possess or enjoy the property or the income therefrom. The value of the nonvoting shares included in the gross estate should reflect the additional value inherent in the closely held voting shares by reason of control of the company policies.

The *Yeazel* court distinguished this Revenue Ruling by stating:

My attention is also called to *Rev. Rul. 67-54, 1967-8 Int. Rev. Bull. 10*, which I am urged to regard as stating that a grantor with control over both the dividend policy of a company and the assets of the trust is able to designate who benefits from the property or income. As applied to the facts in this case, however, I cannot agree with this view of the statute since it is clear that only the four named beneficiaries can benefit from the stock. *Yeazel, supra*, at 8685.

The Court determines that Revenue Ruling 67-54 cannot operate to make includable this trust property in the decedent's estate. The decedent's power to control the trust property was not without limitation and the Court considers that sufficient control was relinquished, and sufficient checks were retained on what control was retained, to avoid the application of Section 2036 to the facts in the instant case. See, generally, *Jennings v. Smith*, 161 F.2d 74 (2nd Cir. 1947) and 3 J. Merten's Estate and Gift Tax § 24.30.

WHEREUPON, the Court determines that the motion of the plaintiff for summary judgment is meritorious and therefore it is GRANTED. The motion of the defendant for summary judgment is without merit and therefore it is DENIED.

Defendant is hereby ORDERED to refund the sum of

\$13,202.45, together with interest at the rate of six percent
(6%) per annum from June 28, 1967.

/s/ Joseph P. Kinneary
United States District Judge

(CAPTION OMITTED)

NOTICE OF APPEAL

(Filed June 10, 1970.)

Notice is hereby given that the United States of America, defendant above named, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the Order granting plaintiff's motion for summary judgment and denying defendant's motion for summary judgment entered in this action on the 16th day of April, 1970.

WILLIAM W. MILLIGAN
United States Attorney

/s/ **ALVIN J. McKENNA**
Assistant United States Attorney

June 10, 1970

(CERTIFICATE OMITTED)

No. 20526

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARIAN A. BYRUM, Executrix under the Last Will
and Testament of MILLIKEN C. BYRUM, Deceased,
PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Southern District of Ohio

Decided and Filed April 8, 1971

Before: PHILLIPS, Chief Judge, BROOKS, Circuit Judge
and O'SULLIVAN, Senior Circuit Judge.

BROOKS, Circuit Judge. This is an appeal by the United States from an adverse ruling of the District Court, 311 F. Supp. 892, on the issue of whether certain assets transferred into an irrevocable trust could be included in decedent-grantor's estate by operation of 26 U.S.C. § 2036.¹ The action arose by a claim for refund of taxes paid and

¹ Section 2036 [as amended by Section 18 (a)(2) of the Revenue Act of 1962, P.L. 87-834, 76 Stat. 960].

"Transfers with retained life estate

"(a) General Rule.—The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—

"(1) the possession or enjoyment of, or the right to the income from, the property, or

"(2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom."

was decided on motions for summary judgment with a stipulated set of facts. We affirm the judgment of the District Court.

That portion of the trust agreement² that the Govern-

² The Trust Agreement in pertinent parts provided:

“Article IV. Irrevocable Trust.

“This Trust shall be irrevocable and Grantor reserves no rights, powers, privileges or benefits either as to the Trust estate or the control or management of the trust property, except as set forth herein.

“Article V. Powers Of The Trustee.

“The Trustee shall have and possess and may exercise at all times not only the rights, powers and authorities incident to the office or required in the discharge of this trust, or impliedly conferred upon and vested in it, but there is hereby expressly conferred upon and vested in the Trustee all the rights, powers and authorities embodied in the following paragraphs in this Article, which are shown by way of illustration but not by way of limitation:

“Sell. 5.02 To sell at public or private sale, to grant options to sell, to exchange, re-exchange or otherwise dispose of all or part of the property, real or personal at any time belonging to the Trust Estate, upon such terms and conditions and for such consideration as said Trustee shall determine, and to execute and deliver all instruments of sale or conveyance necessary or desirable therefor.

“Investments. 5.05 To invest any money in the Trust estate in stocks, bonds, investment trusts, common trust funds and any other securities or property, real or personal, secured or unsecured, whether the obligations of individuals, corporations, trusts, associations, governments, expressly including shares and/or obligations of its own corporation, or otherwise, either within or outside of the State of Ohio, as the Trustee shall deem advisable, without any limitation whatsoever as to character of investment under any statute or rule of law now or hereafter enacted or existing regarding trust funds or investments by fiduciaries or otherwise.

“Voting. 5.06 To vote by proxy or in person any stock or security comprising a part of the trust estate, at any meeting, except that during Grantor's lifetime, all voting rights of any stocks which are not listed on a stock exchange, shall be exercised by Grantor, and after Grantor's death, the voting rights of such stocks shall be exercised by Grantor's wife during her lifetime.

“Leases. 5.09 To make leases for any length of time, whether longer or shorter than the duration of this Trust, to commence at the present time or in the future; to extend any lease; to grant options to lease or to renew any lease; it being expressly understood that the Trustee may grant or enter into ninety-nine year leases renewable forever.

"Income Allocation. 5.13 To determine in its discretion how all receipts and disbursements, capital gains and losses, shall be charged, credited or apportioned between income and principal.

"Limitation. 5.15 Notwithstanding the powers of the Trustee granted in paragraphs 5.02, 5.05, 5.09 and 5.11 above, the Trustee shall not exercise any of the powers granted in said paragraphs unless (a) during Grantor's lifetime said Grantor shall approve of the action taken by the Trustee pursuant to said powers, (b) after the death of the Grantor and as long as his wife, Marian A. Byrum, shall live, said wife shall approve of the action taken by the Trustee pursuant to said powers.

"Article VI. Division At Age 21.

"Principal Disbursements. 6.02 If prior to attaining the age of thirty-five (35), any one of the children of Grantor shall have an emergency such as an extended illness requiring unusual medical or hospital expenses, or any other worthy need including education of such child, the Trustee is hereby authorized and empowered to pay to such child or use for his or her benefit such amounts of income and principal of the Trust as the Trustee in its sole judgment and discretion shall determine.

"Article VIII. Removal of Trustee.

"If the Trustee, The Huntington National Bank of Columbus, Columbus, Ohio, shall at any time change its name or combine with one or more corporations under one or more different names, or if its assets and business at any time shall be purchased and absorbed by another trust company or corporation authorized by law to accept these trusts, the new or successor corporation shall be considered as the said The Huntington National Bank of Columbus, Ohio, and shall continue said Trusts and succeed to all the rights, privileges, duties and obligations herein conferred upon said The Huntington National Bank of Columbus, Ohio, Trustee.

"Grantor, prior to his death, and after the death of the Grantor, the Grantors wife, Marian A. Byrum, during her lifetime, may remove or cause the removal of The Huntington National Bank of Columbus, Ohio, or any successor Trustee, as Trustee under the Trusts and may thereupon designate another corporate Trustee to serve as successor Trustee hereunder.

"Article IX. Miscellaneous Provisions.

"Discretion 9.02 If in the opinion of the Trustee it shall appear that the total income of any beneficiary of any Trust fund created hereunder is insufficient for his or her proper or suitable support, care and comfort, and education and that of said beneficiary's children, the Trustee is authorized to pay to or for such beneficiary or child such additional amounts from the principal of the Trust Estate as it shall deem ad-

ment contends made the assets transferred into trust includable in the grantor's estate under 26 U.S.C. § 2036 relates to the grantor's retained powers to: 1) vote the shares of unlisted stock in the trust corpus; 2) veto the transfer by the trustee of any of these shares of stock; and 3) to remove and appoint a successor corporate trustee at will. It should be noted that the shares of unlisted stock transferred into trust were those of a closed corporation, and the grantor's retaining of the right to vote the stock in trust combined with the stock he personally retained kept him in voting control of the corporation.

The Government's principal argument is that the powers retained by grantor made the value of the shares of stock transferred into trust includable in his estate because the grantor retained for his life "the possession or enjoyment of . . . the property . . ." 26 U.S.C. § 2036(a)(1). The District Court properly concluded that the retaining of the power to veto the sale of these shares of stock by the trustee did not, under present interpretation of the statute, make the value of the shares transferred includable in the grantor's estate, see *Reinecke v. Northern Trust Company*, 278 U.S. 339 (1929); *Michigan Trust Company v. Kavanagh*, 284 F.2d 502 (6th Cir. 1960); *Hays' Estate v. Commissioner of Internal Revenue*, 181 F.2d 169 (5th Cir. 1950); *Jennings v. Smith*, 161 F.2d 74 (2nd Cir. 1947); *Estate of Budd*, 49 T.C. 468 (1968); *Estate of Pardee*, 49 T.C. 140 (1967); Cf. *State Street Trust Company v. United States*, 263 F.2d 635 (1st Cir. 1959). Nor, for that matter, did the grantor's retaining of the power to replace the trustee by another corporate trustee make the value of the shares includable. See *Estate of Budd*, *supra* and cf. Rev. Reg. 20.2036-1(b)(3) with n. 2 Trust Agreement, Article VIII.

The only power retained by the grantor which may possibly have made the transferred assets includable in his estate was the power to vote the unlisted shares of stock. The District Court concluded that this did not make the assets includable and we agree. Several cases have considered this aspect of retained control and have concluded that it is not

visible in order to provide suitably and properly for the support, care, comfort, and education of said beneficiary and of said beneficiary's children, and the action of the Trustee in making such payment shall be binding on all persons.

sufficient to make the value of shares transferred in trust includable in the grantor's estate. See *Estate of Willard V. King*, 37 T.C. 973 (1962); *Yeasel v. Coyle*, 2 CCH Fed. Estate and Gift Tax Rep. (68-1 U.S. Tax Cas.) ¶12,524. The Government's attempt to distinguish these cases is without substance. In addition, the Government's reliance on *United States v. O'Malley*, 383 U.S. 627 (1966) and *Joy v. United States*, 404 F.2d 419 (6th Cir. 1968) is inappropriate under the facts of the present case. In *O'Malley* the crucial factor making the value of the transferred assets includable in the grantors estate was that the grantor retained the power to regulate or allocate the distribution of income. Similarly, in *Joy v. United States*, *supra*, it was the grantor's retained power to accumulate and distribute income which proved fatal. This was not the situation under the present trust agreement. See n. 2 Trust Agreement, Par. 5.13, 5.15, 6.02, 9.02. The Government contends that since the grantor remained in voting control of the corporation he could, by electing the Board of Directors, determine dividend policies and thus the grantor could indirectly regulate or control who enjoyed the income from the property. However, the grantor by retaining the voting right of the stock only controlled who could serve as directors of the corporation. These individual directors would then be under a fiduciary obligation to exercise sound business judgment in declaring dividends and could not act in bad faith to the injury of the beneficial owners of the stock. This obligation is governed by an ascertainable standard and is analogous to the situation which exists in cases where the grantor retains broad managerial control of a trust, see *Reinecke v. Northern Trust Company*, *supra*; *Jennings v. Smith*, *supra*; *Estate of Budd*, *supra*, and does not result in making these assets includable in the grantors estate.

While Revenue Ruling 67-54, 1967-1 Cum. Bull. 269, strictly construed is distinguishable from the facts in this case, it does tend to support the position advanced by the Government on this appeal. Rulings, however, do not have the force of law and are at most merely persuasive. *Lincoln Savings and Loan Association v. Commissioner of Internal Revenue*, 422 F.2d 90, 92 (9th Cir. 1970), U.S. App. Pndg.; 1 Mertens, Law of Federal Income Taxation, § 3.20.

Insofar as such Ruling might be applied to the facts of this case, it is in conflict with the law as interpreted by the courts and should be disregarded. *United States Truck Sales Company v. United States*, 229 F.2d 693, 696 (6th Cir. 1956); *First Kentucky Company v. Gray*, 190 F.Supp. 824, 825 (W.D.Ky., 1960), affirmed 309 F.2d 845 (6th Cir. 1962).

The judgment is affirmed.

PHILLIPS, Chief Judge. (Dissenting.) I respectfully dissent.

Mr. Byrum, the decedent, transferred to the trust some of his shares of stock in three closely-held corporations of which he was the controlling stockholder. He reserved the right to vote the shares which he transferred to the trust. He also continued to have the right to vote the shares owned by him individually which were not transferred to the trust. His right to vote the transferred shares, combined with his right to vote the shares which he held himself and did not transfer in trust, kept him in control of all three corporations throughout his lifetime.

The record ownership of shares of stock in the three corporations as of the time of Mr. Byrums death on September 5, 1964, was as follows:

Corporation	Trust	Settlor	Stock Outstanding
Byrum Litho-			
graphing	165	855	1440
Graphic Realty	276	202	574
Bychrome	308	287	678

As I interpret the trust instrument, Mr. Byrum's control of the three corporations was the same after the creation of the trust as it was before. After the transfers, as before, the settlor remained in a position to dictate the dividend policies of the corporation. He had the power to control the distribution of income to the trust. He could determine when and whether the corporation would distribute earnings as dividends and thus when and whether the trust would receive income from the stock which would be available for distribution to the beneficiaries of the trust.

In addition to reserving the right to vote the stock, he retained the power to veto any sale of the stock by the trustee and the right to remove the trustee and appoint a new trustee.

It is not determinative, in my opinion, that any one of these retained rights, standing alone in a different factual situation, might not have subjected the stock to the federal estate tax as a part of the taxable estate of the decedent. I would hold that the retained powers in the aggregate, under the facts and circumstances of this case, operated to reserve to the settlor the enjoyment of the shares and the right to designate the persons who would enjoy the income from them, within the meaning of § 2036(a)(1) and (2) of the Internal Revenue Code of 1954.

I agree with the Government's interpretation of the trust instrument: that through his control of the corporations the settlor retained the power to determine whether the beneficiaries of the trust would receive income from the shares during his lifetime. When the trust instrument is thus construed, the settlor possessed the right to designate the persons who would enjoy the income from the shares within the meaning of § 2036(a)(2). *U. S. v. O'Malley*, 383 U.S. 627; *Joy v. U. S.*, 404 F.2d 419 (6th Cir.).

Since Mr. Byrum guaranteed to himself the right to control the corporations for his lifetime through rights retained under the trust instrument, the retained rights were of substantial present economic benefit to him. He was assured a position as a salaried officer of the corporations for as long as he desired. He could increase his salary or fringe benefits. He could control all corporate decisions affecting him financially. I would hold that he retained for his life the enjoyment of the transferred stock within the intendment of § 2036(a)(1). See *Commissioner v. Estate of Church*, 335 U.S. 632, 644-46.

I further disagree with the majority opinion with respect to Revenue Ruling 67-54, 1967-1 Cum. Bull. 269. A copy of this ruling is made an appendix to this dissenting opinion. I consider this ruling to be a correct interpretation of the statute.

I would reverse.

APPENDIX

Rev. Rul. 67-54, 1967-1 Cum. Bull. 269:

The value of nonvoting corporate common stock transferred in trust is includible in the grantors gross estate for Federal estate tax purposes, where the grantor retained for the remainder of his life a controlling interest in the corporate voting stock and where (1) the grantor was himself a trustee of the trust at his death, or (2) the trustee was restricted

in any way in his power to dispose of the nonvoting stock, and the trustee held the nonvoting stock at the grantor's death. Since the grantor retained the power to regulate the income from the transferred property, he retained for his life or for a period which did not in fact end before his death the right to designate the persons who shall possess or enjoy the property or the income therefrom. The value of the nonvoting shares included in the gross estate should reflect the additional value inherent in the closely held voting shares by reason of control of the company policies.

Advice has been requested whether the value of nonvoting corporate common stock transferred in trust is includible in the deceased grantor's gross estate for Federal estate tax purposes where he had the power to regulate, for his life or for a period which did not in fact end before his death, the potential income from the transferred property through his retention of the corporation's voting stock, in cases where (1) as trustee he could control the disposition of the transferred property during his lifetime, or (2) the trustee was restricted in any way in his power to dispose of the transferred property, and the trustee held the transferred property at the grantor's death.

The decedent transferred assets to a corporation which issued nonvoting preferred stock and debentures, which he retained, for the full current value of the assets transferred. The corporation also issued 10 shares of voting and 990 shares of non-voting common stock. The decedent transferred the 990 shares of nonvoting stock in trust for the benefit of his children. The trust owned the 990 shares at the date of the decedent's death. The trustee was required to get the permission of the grantor before disposing of the transferred stock. By retaining the 10 shares of voting stock, which he still owned at the time of his death, the decedent had complete control of the company and was in a position to determine its dividend policy in respect of the nonvoting shares. By the restriction upon the trustee, the decedent had control over the disposition of the nonvoting stock.

[The following portion of Rev. Rul. 67-54 was not included in the appendix to Judge Phillips' dissenting opinion but is included here for the convenience of the Court.]

Section 2036(a) of the Internal Revenue Code of 1954 provides:

GENERAL RULE.—The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any

time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—

(1) the possession or enjoyment of, or the right to the income from, the property, or

(2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

Section 20.2036-1(b)(3) of the Estate Tax Regulations provides:

The phrase "right * * * to designate the person or persons who shall possess or enjoy the transferred property or the income therefrom" includes a reserved power to designate the person or persons to receive the income from the transferred property, or to possess or enjoy nonincome-producing property, during the decedent's life or during any other period described in paragraph (a) of this section. With respect to such a power, it is immaterial (i) whether the power was exercisable alone or only in conjunction with another person or persons, whether or not having an adverse interest; (ii) in what capacity the power was exercisable by the decedent or by another person or persons in conjunction with the decedent; and (iii) whether the exercise of the power was subject to a contingency beyond the decedent's control which did not occur before his death (e.g., the death of another person during the decedent's lifetime).

Where a decedent transfers nonvoting stock in trust and holds for the remainder of his life voting stock giving him control over the dividend policy of the corporation, he has retained, for a period which did not in fact end before his death, the right to determine the income from the nonvoting stock. If he also retains control over the disposition of the nonvoting stock, whether as trustee, by restriction upon the trustee, or alone or in conjunction with another, he has in fact made a transfer whereby he has retained for his life the right to designate the persons who shall possess or enjoy the transferred property or the income therefrom. Since under section 20.2036-1(b)(3) of the Estate Tax Regulations it is immaterial in what capacity a power was exercisable by the decedent, it is sufficient that the power was exercisable in the capacity of controlling stockholder. Under the facts of this case, therefore, the decedent has made a transfer with a reserved power within the meaning of section 2036(a) of the Code.

Section 20.2031-2(f)(2) of the regulations provides, in part, that in determining the fair market value of shares of stock where actual prices and bona fide bid and asked

prices are lacking, one of the relevant factors to be considered is the degree of control of the business represented by the block of stock to be valued. Where the block consists of the voting common stock of a corporation, a substantial portion of the entire value of the common stock is to be attributed to that block, and hence the per share value of the voting stock should be relatively larger than the per share value of the nonvoting stock.

Accordingly, it is held that the value of nonvoting corporate stock transferred to a trust is includible in the gross estate of a deceased grantor for Federal estate tax purposes under section 2036 of the Code where the grantor owned the voting stock for the remainder of his life and was therefore able to control the income from the transferred property, and where the trustee was restricted in his power to dispose of the transferred property and held it at the grantor's death. The grantor thereby retained for his life or for a period which did not in fact end before his death the right to designate the persons who shall possess or enjoy the transferred property or the income therefrom. Under section 2031 of the Code, the value of the nonvoting shares included in the gross estate should reflect the additional value inherent in the closely held voting shares by reason of control of the company policies.

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

No. 20,526

**MARIAN A. BYRUM, Executrix under the Last Will
and Testament of MILLIKEN C. BYRUM, Deceased,
PLAINTIFF-APPELLEE**

vs.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

[Filed April 8, 1971]

**BEFORE: PHILLIPS, Chief Judge, BROOKS, Circuit Judge,
and O'SULLIVAN, Senior Circuit Judge
Appeal from the United States District Court
for the Southern District of Ohio**

JUDGMENT

**THIS CAUSE came on to be heard on the record from the
United States District Court for the Southern District of
Ohio and was argued by counsel.**

**ON CONSIDERATION WHEREOF, It is now here ordered and
adjudged by this Court that the judgment of the said Dis-
trict Court in this cause be and the same is hereby affirmed.**

**It is further ordered that Plaintiff-Appellee recover from
Defendant-Appellant the costs on appeal, as itemized be-
low, and that execution therefor issue out of said District
Court.**

**Entered by order of the
Court**

**/s/ Carl W. Reuss
Clerk**

Issued as Mandate:

COSTS: NONE

SUPREME COURT OF THE UNITED STATES

No. 71-308

UNITED STATES,

Petitioner,

v.

MARIAN A. BYRUM, *Executrix Under the Last Will
and Testament of Milliken C. Byrum*

ORDER ALLOWING CERTIORARI. Filed November 9, 1971.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted.

